Supreme Court, U. S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-1150

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

DORIA MINING AND ENGINEERING CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1150

THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

DORIA MINING AND ENGINEERING CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

1. Between 1953 and 1955, the predecessors in interest of respondent Doria Mining and Engineering Corporation claimed a discovery of valuable deposits of sand and gravel, and filed 18 association placer mining claims of 40 acres each, in the Cajon Pass area of the San Bernardino National Forest, California (Pet. App. 1-2, 16, 41). In 1968, the United States Forest Service issued to petitioner State of California an easement across portions of land covered by Doria's claims for the purpose of constructing an interstate highway. In 1961 and 1970, the Forest Service issued special use permits to petitioner Calnev Pipeline Company that enabled Calnev to construct high pressure pipelines across lands covered by Doria's claims. Both the easement and the permits were issued subject to

all valid claims, but the State and Calnev did not obtain permission from Doria prior to constructing the highway and pipelines (Pet. App. 2, 10, 16-17).

In December 1970 and January 1971, Doria filed civil actions in state court against the State and Calnev, alleging trespass and inverse condemnation and seeking damages in excess of $15 million (Pet. App. 2, 11, 17). The State and Calnev thereupon initiated a private contest proceeding before the Department of the Interior, pursuant to 43 C.F.R. 4-450-1, asserting interests adverse to Doria's in the lands covered by the mining claims, and alleging that Doria's claims were invalid for failure to discover a valuable mineral deposit within their limits. The United States intervened as a contestant on behalf of the Forest Service. Following a hearing, the administrative law judge found that there had been no discovery of valuable mineral deposits on any of the lands covered by Doria's claims, and accordingly held that Doria's claims were null and void (Pet. App. 18-19). This decision was affirmed by the Board of Land Appeals (Pet. App. 15-40).

2. On March 12, 1975, Doria filed a complaint in the United States District Court for the Central District of California to review the Department's decision. The complaint alleged, *inter alia*, that Doria had been denied a fair hearing because G. Austin Schroter, one of the contestants' witnesses, had been permitted to testify regarding the value of the sand and gravel deposits "on the basis of inappropriate testing methods and on other false premises utilized by him" (R. 7).[1] Thirteen months

[1]"R." refers to the record on appeal.

later, after petitioners and the federal respondents had moved for summary judgment, Doria filed a motion to amend its complaint, alleging that it had uncovered in collateral state court proceedings evidence of fraud and perjury at the administrative hearing.[2] The district court denied the motion to amend, apparently because it believed itself without jurisdiction to consider evidence outside the administrative record (Pet. App. 3-5 & n.2). The court subsequently granted summary judgment affirming the administrative decision (Pet. App. 10-14).

On appeal, the court of appeals vacated the district court's judgment and remanded the case for consideration of Doria's motion to amend the complaint (Pet. App. 1-9). The court acknowledged (*id.* at 5) that the appropriate standard for review of administrative proceedings is whether the administrative findings are supported by substantial evidence in the record as a whole. However, the court held that where "the party seeking review alleges that it has discovered new evidence showing that the decision before the court for review was obtained by a fraud on the administrative proceeding, * * * the

[2]In its motion to amend the complaint, Doria alleged that exhibits introduced in evidence at the administrative hearing purporting to set forth test results on samples taken from Doria's claims "substantially vary and differ from the actual test sheets prepared by the State laboratory," that the exhibits "materially distort" the test results and findings of the State laboratory, and that the State laboratory in conducting the tests "failed to comply with standard procedures established by the State of California for all material testing laboratories * * *" (R. 342). Doria further alleged that this information was not available to it during the administrative hearing and appeal, and that it had only recently come to light in connection with discovery proceedings in the state court litigation against the State and Calnev (R. 342).

reviewing court may consider evidence extrinsic to the record in determining whether such allegations are meritorious" (*ibid.*).

3. The decision of the court of appeals is consistent with the decisions of this Court, does not conflict with the decisions of any other court of appeals and does not warrant further review.

At the outset, it should be emphasized that the decision below is narrow in scope. The court of appeals has not ruled that a court reviewing an administrative determination must always consider the merits of newly raised allegations of fraud. Rather, the court has simply announced a rule that the reviewing court has the jurisdiction, and, in appropriate cases, should exercise its discretion, to hear new allegations of fraud based on evidence extrinsic to the record in order to prevent injustice. In deciding whether to exercise discretion to hear new allegations of fraud, the reviewing court is to consider (Pet. App. 6 n.3, quoting from *Standard Oil Co.* v. *Montedison S.p.A.*, 540 F. 2d 611, 617 (3d Cir. 1976)):

> (1) whether there was "suppression, bad faith, or gross negligence on the part of the plaintiff in failing to raise the issue of fraud before the Board"; (2) whether evidence of the alleged fraud was "reasonably available" at the time the dispute was before the Board; and (3) whether the issue "has been or may be more conveniently and expeditiously raised in another" forum.

Thus, if the district court on remand should determine that Doria could have raised its fraud allegations at the administrative level, it may deny Doria's motion to amend the complaint. Moreover, even if the district court

concludes that the information is newly discovered and that there is merit to the fraud allegations, the court is nevertheless free to determine that the fraud was immaterial to the outcome of the administrative proceeding and that no injustice would result from reinstatement of the summary judgment in favor of petitioners and the federal respondents.

This Court has recognized the general rule that a court reviewing an administrative decision should not consider issues that were not properly raised before the agency. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946). However, the Court has noted that unusual circumstances may arise that "will prompt a reviewing * * * court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941). See *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). Accordingly, the Court has concluded that the failure of a party to raise a then non-existent issue before an administrative agency does not deprive the reviewing court of power to consider the issue once it does come into existence. *NLRB* v. *Jones & Laughlin Co.*, 331 U.S. 416, 427-428 (1947).

The decision below is consistent with these settled principles. As the court of appeals observed (Pet. App. 7), "[n]ewly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the administrative record. If the reviewing court, in the face of an allegation that such evidence exists and that administrative remedies have been exhausted, nevertheless confines itself to consideration only of evidence in the

record, the party seeking review is left without any forum in which to argue the allegedly fraudulent basis of the administrative judgment." We agree with the court of appeals that foreclosing review of newly discovered evidence of fraud would defeat, rather than promote, the ends of justice. See *Hormel* v. *Helvering*, *supra*, 312 U.S. at 557.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980